



## STATEMENT OF THE CASE

Defendant-Appellant Tremayne Chapman (“Chapman”) appeals after a jury convicted him of murder.

We affirm.

## ISSUES

Chapman challenges the sentence imposed by the trial court. Restated, the following issues are presented for our review:

- I. Whether the trial court violated Chapman’s Sixth Amendment rights by imposing a sentence based upon aggravating circumstances not found by a jury; and
- II. Whether the trial court abused its discretion when sentencing Chapman.

## FACTS AND PROCEDURAL HISTORY

The facts most favorable to the jury’s verdict reveal that on December 9, 2004, Paula Carson (“Paula”), Tadora Merritt, and Thomas Scott returned to Paula’s apartment complex in Gary, Indiana. Chapman, Lionel Sims, Mitchell Armstrong, and Andre Paige were gathered on the sidewalk near Paula’s apartment. The group, and Lionel’s brother, Donielle, all assembled at Paula’s apartment to play cards and drink. Paula did not know Paige, but Chapman had convinced Paula to allow Paige to come inside by saying that he knew Paige and would vouch for him. Paula’s cousin, Charlotte Murray, who was sixteen-years-old, was also in Paula’s apartment babysitting Paula’s two young children, and one of Merritt’s children.

The adults continued to play cards and drink alcohol. Paige indicated that he had a delivery of marijuana coming and that he would sell some to the others. At some point,

Chapman became convinced that Paige was a confidential informant, and that the police had sent Paige for Chapman. Chapman became convinced that Paige had to die.

Chapman then told Paula that he had lied about knowing Paige. Paula directed all of the adults, except for Merritt and Scott, to leave her apartment. Chapman then said he needed to leave anyway because he had to attend a hearing in drug court in the morning. Chapman, Lionel Sims, and Armstrong followed Paige out the back door of Paula's apartment, where Chapman and the others began beating Paige. Paige fell to the ground.

Chapman stomped on Paige's head and chest with his foot, and jumped on Paige's head and chest. Paige did not move, but tried to protect himself as blood came from his mouth and head. Chapman repeatedly yelled profanities about Paige needing to die.

Chapman told Paula, Merritt, Scott, Armstrong, and Lionel and Donielle Sims that no one could leave. He declared that they were all complicit and directed Scott to take the group in Scott's van to dispose of Paige's body. Chapman threatened to kill anyone who had witnessed the beating, but failed to assist in the disposal of Paige's body. While the group was in the van, Chapman continued to kick Paige in the head and yell profanities. Chapman shared with the others his theory that Paige was there to set him up. At that time, Paige, who was still alive, made loud snoring noises as he struggled to breathe. Paige's blood covered the interior of the van.

Scott pulled the van off the road in a dark, swampy area of Gary. Paige's clothing came off as he was dragged from the van. When the second round of beatings began, Paige was dressed in only a t-shirt and underwear. Chapman renewed his efforts to stomp on Paige's body and shout that Paige had to die. Chapman again threatened the

group with their lives if they did not join in the beating. Chapman ordered Armstrong to stab Paige, which he did several times. Paula, Merritt, and Donielle Sims hit Paige with beer bottles. Scott hit Paige with a tree branch. Paige, who was still alive, reached up and grabbed Lionel Sims' pants leg. Chapman told Sims to step back, and then hit Paige in the head with a bottle of Colt 45 Chapman was holding. Chapman flipped Paige over, so that Paige was lying face-down in some nearby standing water.

The group then left for Paula's apartment, stopping at a liquor store along the way. Chapman threatened to kill anyone who contacted the police about the crime. Chapman then bragged about how he had killed Paige. Chapman took all of the bloody clothes from the group in order to burn the clothes.

Paige sustained twenty-five separate injuries. He had a concussion across both lobes of his brain, eight puncture wounds, chopping wounds and cuts over his scalp and face. He also suffered a broken nose. Three of Paige's teeth were broken down to the bone, one of which he inhaled. Paige died from the injuries to his head and from inhaling his own blood.

Paige's body was found on December 11, 2004, by a motorist who thought he saw a mannequin floating in the water. On December 14, 2004, Charlotte Murray's sister contacted the Gary Police Department after Charlotte told her what had happened. On December 21, 2004, Paula and Merritt gave statements to the police. Chapman was arrested on December 24, 2004.

Chapman's jury trial began on July 18, 2005. Paula, Merritt and Scott testified on behalf of the State at Chapman's trial. On July 22, 2005, the jury found Chapman guilty of murder.

Chapman's sentencing hearing was held on August 24, 2005. The trial court sentenced Chapman to the Department of Correction for sixty years. The advisory sentence for murder is fifty-five years. Ind. Code §35-50-2-3. Chapman initiated this appeal in which he challenges the sentence imposed by the trial court.

### DISCUSSION AND DECISION

#### THE SENTENCING STATEMENT

The trial judge made the following findings with regard to mandatory considerations<sup>1</sup> during sentencing: 1) the risk that Chapman would commit another crime is high because of his prior contacts with the criminal justice system; 2) the nature and circumstances of the crime involved a brutal murder taking place over a prolonged period of time; 3) Chapman's prior criminal history as an adult included three misdemeanor convictions, and two active warrants out of city court; and, 4) Chapman's character is violent, alcoholic, immature and sadistic.

The trial court found the following mitigating circumstances: 1) Chapman grew up in an alcoholic home; 2) Chapman was under the influence of alcohol at the time of the murder; 3) Chapman has limited intelligence based upon his placement in special education in high school; and 4) Chapman has expressed remorse for fighting, but

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<sup>1</sup> Ind. Code §35-38-1-7.1 was amended effective April 25, 2005 to eliminate the mandatory considerations section of the statute. Chapman was sentenced in August of 2005, but the trial court made findings in reference to the previously required mandatory considerations.

maintains his innocence. The trial judge assigned little weight to the circumstances of Chapman's childhood, low weight to Chapman's intoxication at the time of the murder, medium weight for Chapman's remorse, and no weight to Chapman's intellectual abilities or limitations.

The trial court found the following aggravating circumstances: 1) Chapman violated the conditions of pre-trial release in another court with an active warrant for failure to appear existing at the time of the commission of the murder; 2) Chapman has a history of criminal activity; 3) Chapman is in need of correctional and rehabilitative treatment best provided by a penal facility because prior lenient treatment has not had a deterrent effect; and 4) the specific nature and manner of the murder.

The trial judge found that the mitigators were "dramatically" outweighed by the aggravators. Appellant's App. p. 43. The trial judge noted that for over ten years Chapman has shown disdain for authority by committing misdemeanor offenses, using marijuana for approximately six years, and by failing to appear in court to answer to charges. The trial judge also stated that of greatest aggravation was the brutal and sadistic nature of the crime.

The trial court committed Chapman to the Department of Correction for a period of sixty years. Chapman was credited with two hundred forty-six days actually spent in confinement on the murder charge, plus two hundred forty-six days of good time credit.

#### I. CHAPMAN'S *BLAKELY* CLAIM

Chapman claims that the trial judge erred when she sentenced Chapman because she considered factors that were not tried to the jury and proven beyond a reasonable

doubt. Chapman cites to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005) to support his position. The State argues that Chapman has waived his right to bring this challenge upon appeal because he failed to object on that basis at his sentencing hearing.

The State is correct that most claims are not available for appellate review unless first made at trial. However, our supreme court in *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005), held that for cases involving *Blakely* claims, if an appellant's initial brief on direct appeal was filed prior to the date of the *Smylie* decision, March 9, 2005, an appellant who had contested his or her sentence in some respect in the appellant's initial brief on direct appeal is entitled to review on the merits of a subsequently-raised *Blakely* claim. That appellant must have challenged his sentence in the initial brief, and then 1) amended the brief, 2) filed a petition for rehearing, or 3) filed a petition for transfer incorporating a *Blakely* claim. *Id.* For situations such as the present case, in which the appellant's initial brief was filed after the date *Smylie* was handed down, a specific *Blakely* claim must be made in the appellant's initial brief on direct appeal for it to be reviewed on the merits. Chapman's initial brief was filed on May 3, 2006, in which he advances a *Blakely* claim. Therefore, pursuant to the holdings in *Kincaid*, Chapman is entitled to review on the merits.

The aggravating factor given the most weight was the nature and manner of the murder. Chapman argues that a trial court may not use a material element of an offense as an aggravating circumstance. His argument continues that since the jury verdict only reflects a finding of the material elements of the crime, the trial court could not use the

specific nature and manner of the crime in aggravation of Chapman's sentence because those facts were not found by the jury.

The facts the trial court used to support the aggravator, nature and manner of the murder, were not material elements of the crime. Therefore, the error does not flow from that aspect of Chapman's argument. Rather, our supreme court has held that, except when supported by facts otherwise properly found, and meant as concise descriptions of the moral or penal weight of those facts in assessing criminal culpability, the aggravator "nature and circumstances of the crime" runs afoul of the Sixth Amendment. *See Mitchell v. State*, 844 N.E.2d 88, 91 (Ind. 2006); *Morgan v. State*, 829 N.E.2d 12, 17-18 (Ind. 2005). Chapman did not admit to the facts used to support this aggravating circumstance, and the facts were not otherwise properly found. Therefore, this aggravator is impermissible in this situation.

Chapman challenges the trial court's finding of Chapman's need for correctional and rehabilitative treatment best provided in a penal facility as an aggravating circumstance. Our supreme court has held that the factor "in need of rehabilitative treatment" as an aggravating circumstance applies when the trial court explains why the specific defendant needs treatment provided in a penal facility. *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005). In order to support use of that factor, however, the trial court must give a specific and individualized statement explaining why extended incarceration is appropriate. *Id.*

In the present case the trial judge explained that Chapman was in need of correctional and rehabilitative treatment because prior lenient treatment has not had a



deterrent effect. Therefore, it would seem that the trial court met the requirement of an individualized statement. Consequently, Chapman argues that the trial judge's statement is deficient. However, according to *Morgan*, our supreme court has held that the "need for corrective or rehabilitative treatment" aggravator is a legitimate observation about the weight to be given to facts appropriately noted by the trial court judge, but it cannot serve as a separate aggravating factor. 829 N.E.2d at 17. Therefore, to the extent the trial court used this observation as a separate aggravating circumstance in sentencing Chapman, the trial court erred. However, this court has held that the "need for corrective or rehabilitative treatment" aggravator is derivative of the defendant's criminal history. *Pinkston v. State*, 836 N.E.2d 453, 465 (Ind. Ct. App. 2005). Therefore, while this observation may not stand alone as an aggravating circumstance, it may be useful in our review of the weight given by the trial court to Chapman's prior criminal history.

Chapman does not dispute the trial court's finding that he had violated the conditions of the pre-trial release granted to him by another court on an unrelated case. We have held that absent an admission by Chapman, the fact of poor performance in a pre-trial release program when used as an aggravating circumstance violates *Blakely*. See *Vela v. State*, 832 N.E.2d 610, 614 (Ind. Ct. App. 2005). However, this information is contained in Chapman's pre-sentence investigation report. Pre-sentence investigation reports rely on judicial records whose conclusive significance does not run afoul of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Ryle v. State*, 842 N.E.2d 320, 325 (Ind. 2005). Therefore, this aggravating factor, which was unchallenged by Chapman, is permissible nevertheless.

Thus, of the four aggravating circumstances found by the trial court, two of them run afoul of *Blakely*. A trial court can not use the nature and circumstances of the crime as an aggravating circumstances unless the facts supporting that conclusion are admitted by the defendant or found by a jury. The aggravating circumstance involving the defendant's need for correctional and rehabilitative treatment best provided by a penal facility can not stand alone as an aggravating circumstance.

### III. ABUSE OF DISCRETION IN SENTENCING

In general, sentencing decisions are left to the sound discretion of the trial court, are given great deference on appeal, and will be reversed only for an abuse of discretion. *Puckett v. State*, 843 N.E.2d 959, 962 (Ind. Ct. App. 2006). Furthermore, the trial court's determination of the proper weight to be given an aggravating or mitigating circumstance is entitled to great weight and will be set aside only upon a showing of a manifest abuse of discretion. *Teer v. State*, 738 N.E.2d 283, 291 (Ind. Ct. App. 2000).

When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). Where the finding of some of the aggravators might be improper and others are valid, a sentence enhancement may still be upheld. *Id.*

The trial court found that Chapman's prior criminal history was an aggravating circumstance. Chapman argues that his prior criminal history involved no prior juvenile or felony convictions. He does not dispute the fact that he has three misdemeanor convictions. Instead, he argues that the three misdemeanor convictions do not support

the usage of this aggravating circumstance to enhance his sentence beyond the presumptive term.

A single aggravating circumstance can justify the imposition of an enhanced sentence. *Muncy v. State*, 834 N.E.2d 215, 217 (Ind. Ct. App. 2005). A criminal record, in and of itself, can be sufficient to support an enhanced sentence. *Parker v. State*, 773 N.E.2d 867, 872 (Ind. Ct. App. 2002). Our supreme court has stated in *Morgan*, 829 N.E.2d at 15, that while a sentence enhancement based upon a defendant's prior criminal history does not violate the Sixth Amendment, the extent to which the sentence is enhanced turns upon the weight of the defendant's criminal history. The weight is measured by the number of prior convictions and their seriousness, their proximity or lack thereof to the present offense, and any similarity or dissimilarity to the present offense that might reflect on the defendant's culpability. *Id.* The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense. *Id.*

Turning to the present case, Chapman has three misdemeanor convictions. One conviction was for carrying a handgun without a license. Another conviction was for criminal trespass. The third conviction was for public intoxication. While Chapman's criminal history is not the most extensive history on record, it is sufficient to warrant some enhancement of Chapman's sentence. Chapman was intoxicated at the time of the commission of the murder, and his most recent conviction was for public intoxication. Therefore, while Chapman's criminal history is not overly extensive, it is entitled to some weight.

The present offense occurred while Chapman was on pre-trial release for another offense in a different court. The trial judge explained that the aggravating circumstances outweighed the mitigating circumstances in part because Chapman had shown disdain for authority by committing misdemeanor offenses and failing to appear in court to answer charges.

The trial judge found four mitigating circumstances. Of those circumstances, one was assigned no weight, one was assigned low weight, one was assigned little weight, and Chapman's remorse was assigned medium weight. We note that Chapman's remorse was for his involvement in fighting only. Chapman denied culpability in the murder.

The potential sentencing range for the offense of murder is between forty-five and sixty-five years. Ind. Code §35-50-2-3. The advisory sentence is fifty-five years. *Id.* Chapman received a sixty-year sentence.

Although the trial court assigned the greatest weight to the aggravating circumstance, the nature and circumstances of the murder, which in this situation was impermissibly found, the trial court did not impose the maximum sentence. There are two valid aggravating circumstances that remain. Further, of the mitigating circumstances, the one assigned the most weight, was Chapman's conditional remorse. The trial judge did not abuse her discretion in imposing this sentence.

#### CONCLUSION

In this situation, the two aggravating circumstances were impermissibly found. However, the trial judge did not abuse her discretion by imposing this sentence. The trial

court did find valid aggravating circumstances and when weighed against the mitigating circumstances, justified the slightly enhanced sentence imposed.

Affirm.

VAIDIK, J., and CRONE, J., concur.